

# Order

June 8, 2005

Michigan Supreme Court  
Lansing, Michigan

Clifford W. Taylor  
Chief Justice

Michael F. Cavanagh  
Elizabeth A. Weaver  
Marilyn Kelly  
Maura D. Corrigan  
Robert P. Young, Jr.  
Stephen J. Markman  
Justices

ADM File No. 2004-33

Amendment of  
Rule 9.221 of the  
Michigan Court Rules

---

On order of the Court, the need for immediate action having been found, the notice requirements are dispensed with and the following amendments of Rule 9.221 of the Michigan Court Rules are adopted, effective immediately. MCR 1.201(D). The amendments will be considered at a future public hearing by the Court.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

Rule 9.221 Confidentiality; Disclosure

(A) Scope of Rule. Except as provided in this rule, all papers filed with the commission and all proceedings before it are confidential in nature and are absolutely privileged from disclosure by the commission or its staff, including former members and employees, in any other matter, including but not limited to civil, criminal, legislative, or administrative proceedings. All the commission's investigative files and commission-generated documents are likewise confidential and privileged from disclosure. Nothing in this rule prohibits the respondent judge from making statements regarding the judge's conduct.

~~(A)~~(B) Before Filing a Formal Complaint.

(1) Before a complaint is filed, ~~a member of the commission~~ neither a commissioner nor its a member of the commission staff may ~~not~~ disclose the existence or contents of ~~the an~~ investigation, testimony taken, or papers filed in it, except as needed for investigative purposes. ~~but the commission may at any time make public statements as to matters pending before it on its determination by a majority vote that it is in the public interest to do so, limited to the fact that~~

(2) The commission may at any time make public statements as to matters pending before it on its determination by a majority vote that it is in the public interest to do so, limited to statements

~~(1)~~(a) that there is an investigation pending, ~~or~~

(2)(b) that the investigation is complete and there is insufficient evidence for the commission to file a complaint, or

(c) with the consent of the respondent, that the investigation is complete and some specified disciplinary action has been taken.

(C) ~~Consent of Judge. On the written consent of a judge who is being investigated, the commission may disclose matters relating to the investigation, notwithstanding the prohibitions against disclosure set forth in this rule.~~ Discretionary Waiver of Confidentiality or Privilege. The commission may waive the confidentiality or privilege protections if:

(1) the respondent waives, in writing, the right to confidentiality or privilege;

(2) the grievant waives, in writing, the right to confidentiality or privilege;

(3) the witness whose statement, testimony, or other evidentiary item will be disclosed waives, in writing, the right to confidentiality or privilege; and

(4) a majority of the commission determines that the public interest will be served by doing so.

(B)(D) ~~After Filing of Formal Complaint. After the complaint is filed, the proceedings are available for public inspection and must be conducted in open public hearings.~~

(1) When the commission issues a complaint, the following shall not be confidential or privileged:

(a) the complaint and all subsequent pleadings filed with the commission or master, all stipulations entered, all findings of fact made by the master or commission, and all reports of the master or commission; however, all papers filed with and proceedings before the commission during the period preceding the issuance of a complaint remain confidential and privileged except where offered into evidence in a formal hearing; and

(b) the formal hearing before the master or commission, and the public hearing provided for in MCR 9.216.

(2) This subrule neither limits nor expands a respondent's right to discovery under MCR 9.208(C).

(3) The confidentiality or privilege of any otherwise nonpublic disciplinary action is waived in any proceeding on a concurrent or subsequent formal complaint.

(E) Disclosure to Grievant.

- (1) Upon completion of an investigation or proceeding on a complaint, the commission shall disclose to the grievant that the commission
  - (a) has found no basis for action against the judge or determined not to proceed further in the matter,
  - (b) has taken an appropriate corrective action, the nature of which shall not be disclosed, or
  - (c) has recommended that the respondent be publicly censured, suspended, removed, or retired from office.

(F) Public Safety Exception. When the commission receives information concerning a threat to the safety of any person or persons, information concerning such person may be provided to the person threatened, to persons or organizations responsible for the safety of the person threatened, and to law enforcement or any appropriate prosecutorial agency.

~~(D)~~(G) Disclosure to State Court Administrator.

- (1) [Unchanged.]
- (2) [Unchanged.]

~~(E)~~(H) Disclosure to Attorney Grievance Commission. Notwithstanding the prohibition against disclosure in this rule, the commission shall disclose information concerning a judge's misconduct in office, mental or physical disability, or some other ground that warrants commission action under Const 1963, art 6, § 30, to the Attorney Grievance Commission, upon request. Absent a request, the commission may make such disclosure to the Attorney Grievance Commission. In the event of a dispute concerning the release of information, either the Attorney Grievance Commission or the Judicial Tenure Commission may petition the Supreme Court for an order of disclosure, and the Judicial Tenure Commission may file a response resolving the dispute.

Staff Comment: New subrule (A) explains that Judicial Tenure Commission proceedings and investigative files are confidential and privileged from disclosure. The subrule addresses the ruling in *Lawrence v Van Aken*, 316 F Supp 2d 547 (WD Mich, 2004), which required the commission to disclose its investigative files because the language of MCR 9.221 did not render the files “privileged” from disclosure.

Subrule (B) clarifies that, before it files a formal complaint, the commission is limited in the type of information it can divulge regarding an investigation. New subrule (C) allows the commission to waive confidentiality of its records, in certain specified circumstances, and divulge

information related to an investigation. New subrule (D) clarifies when the commission can reveal information about an investigation after the commission files a formal complaint.

New subrule (E) specifies the instances in which the commission can disclose information about the investigation to the grievant. New subrule (F) creates a “public safety exception” to the rule prohibiting disclosure. This exception authorizes the commission to disclose threats against a person to the person whose safety is threatened. Subrule (H) allows either the Judicial Tenure Commission or the Attorney Grievance Commission to ask the Supreme Court to resolve a dispute regarding the disclosure of the commission’s investigatory records.

The staff comment is not an authoritative construction by the Court.



I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 8, 2005 <sup>4</sup> Anger 3. Meyer  
Deputy Clerk